

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of the Telecommunications Act of 1996)	CC Docket No. 96-115
)	
Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information)	CC Docket No. 96-149
)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended)	

COMMENTS OF CENTURYTEL, INC.

CENTURYTEL, Inc.

John F. Jones
Vice President, Federal Government Relations
CENTURYTEL, INC.
100 Century Park Drive
Monroe, Louisiana 71203
(318) 388-9000

Karen Brinkmann
Tonya Rutherford*
Latham & Watkins
Suite 1000
555 Eleventh Street, N.W.
Washington, D.C. 20004-1304
(202) 637-2200
Counsel for CenturyTel, Inc.

*Authorized to practice in Georgia only.

TABLE OF CONTENTS

SUMMARY	ii
I. BACKGROUND	1
II. DISCUSSION	3
A. Customers' Reasonable Expectation of Privacy Does Not Preclude an Opt-out Approach	4
B. An Opt-In Approach Unduly Restricts Carriers' First Amendment Freedoms and Is Not Justified	8
C. There Are Significant Costs Associated With Opt-in.....	10
III. CONCLUSION.....	12

SUMMARY

In implementing Section 222 of the Communications Act, the Commission concluded that carriers must obtain express approval from their customers prior to using their CPNI to market products within a category of service to which the customer does not subscribe from that particular carrier. On appeal, the United States Court of Appeals for the Tenth Circuit vacated the Commission's *CPNI Order*, concluding that the Commission had failed to adequately consider the constitutional implications of its CPNI regulations. The Commission now seeks comments on methods of customer consent that would be consistent with the carriers' First Amendment freedoms.

CenturyTel advocates an opt-out approach. Under this approach, following proper notification by the carrier, carriers are allowed to assume that the customer approves of the use of his CPNI for marketing purposes, unless the customer indicates otherwise. Contrary to statements made in the Commission's *CPNI Order*, customers expect their telecommunications providers to use their CPNI to market them new services. Consequently, customers' reasonable expectation of privacy does not preclude an opt-out approach. An opt-in approach, on the other hand, unduly limits a carrier's right to communicate with its subscriber base. Furthermore, there are significant costs associated with an opt-in approach. Because it is less costly, more effective, and reflects customer expectations in the current competitive telecommunications marketplace, CenturyTel supports an opt-out approach.

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Comments of CenturyTel, Inc.

CenturyTel, Inc. ("CenturyTel"), through its attorneys, hereby offers the following Comments on the Clarification Order and Second Further Notice of Proposed Rulemaking in the above-captioned proceeding released September 7, 2001 ("Clarification Order and Second Further Notice").¹

I. BACKGROUND

As part of the Telecommunications Act of 1996,² Congress enacted Section 222, which governs the use and disclosure of customer proprietary network information (CPNI) and other customer information. Section 222(c)(1) provides that "except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains CPNI by virtue of its provision of a telecommunications service shall only use, disclose, or permit access

¹ *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, FCC 01-247, Clarification Order and Second Further Notice of Proposed Rulemaking (rel. Sept. 7, 2001) ("*Clarification Order and Second Further Notice*").

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151 *et seq.*).

to individually identifiable CPNI in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.”³

In the *CPNI Order*, the Commission adopted the total service approach, which allows a carrier to use, disclose, or share CPNI, without first obtaining customer approval, for the purpose of marketing products within a category of service to a customer if that customer already purchases products within that category of service from that carrier.⁴ With respect to the marketing of products within a category of service to which the customer does not subscribe from that particular carrier, however, the Commission required carriers to obtain express approval from the customer prior to using his or her CPNI.⁵ This approach is also known as the “opt-in” approach. The Commission’s decision was appealed.

In *U.S. West, Inc. v. Federal Communications Commission*, the United States Court of Appeals for the Tenth Circuit concluded that the Commission failed to adequately consider the constitutional implications of its CPNI regulations, and that, as a consequence, “its CPNI regulations must fall under the First Amendment.”⁶ In September of this year, the Commission issued an order clarifying the status of its CPNI rules after the Tenth Circuit’s

³ 47 U.S.C. § 222(c)(1).

⁴ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998) (*CPNI Order*) at 8084, ¶32.

⁵ *Id.* at 8130, ¶91.

⁶ *U.S. West, Inc. v. Federal Communications Commission*, 182 F.3d 1224, 1240 (10th Cir. 1999) (“*U.S. West, Inc. v. FCC*”).

opinion and generally sought comment on methods of customer consent that would afford informed consent consistent with the First Amendment.⁷

II. DISCUSSION

CenturyTel supports an opt-out approach for obtaining customer consent to use CPNI because customers expect their telecommunications carriers to use their CPNI to market new telecommunications services. Under an opt-out approach, the carrier would be required to notify its customers of their CPNI rights and then process any requests for privacy following such notification.⁸ Under this approach, and with proper customer notification by the carrier, the carrier is allowed to assume that the customer approves of the use or disclosure of his or her CPNI for marketing purposes, unless the customer informs the carrier otherwise.

In *U.S. West, Inc. v. FCC*, the court stated that, in order to justify speech restrictions imposed to protect privacy, the Commission must demonstrate how the “dissemination of the information desired to be kept private would inflict *specific and significant harm* on individuals, such as undue embarrassment or ridicule, intimidation or harassment, or misappropriation of sensitive personal information for the purposes of assuming another’s identity.”⁹ CenturyTel contends that the Commission simply cannot prove that its rules meet this test. In evaluating customers’ attitudes toward its use of CPNI, CenturyTel has found, and will explain below, that the use of CPNI does not invoke the feelings of misappropriation or undue embarrassment that the Commission’s *CPNI Order* speculated it would. On the contrary, customers desire and expect that carriers will use and have access to CPNI to provide the best possible service. As the Tenth Circuit noted in its opinion, “while protecting against disclosure

⁷ Clarification Order and Second Further Notice.

⁸ CPNI Order at 8159-65, ¶¶132-42.

of sensitive and potentially embarrassing personal information may be important in the abstract, [there is] no indication of how it may occur in reality with respect to CPNI.”¹⁰ An opt-out approach can satisfy the requirements of Section 222 without burdening the First Amendment rights of carriers.

A. Customers’ Reasonable Expectation of Privacy Does Not Preclude an Opt-out Approach

In implementing Section 222, the Commission was guided by its perceptions of “customers’ reasonable expectations of privacy.”¹¹ Although the Commission cited the legislative history of the statute, there is, in fact, little guidance concerning the appropriate balance between privacy and other concerns.¹² The Court of Appeals questioned whether the privacy concerns, as articulated, met the test for a “substantial state interest” justifying the restriction of speech.¹³ The court characterized the Commission’s proffered privacy interest as mere speculation “hardly reflect[ing] the careful calculation of costs and benefits that our commercial speech jurisprudence requires.”¹⁴ Even assuming a legitimate privacy interest, however, the court held “the specific privacy interest must be substantial, demonstrating that the

⁹ *U. S. West, Inc. v. FCC*, 182 F.3rd at 1237.

¹⁰ *Id.* at 1237.

¹¹ See e.g., *CPNI Order*, 13 FCC Rcd at 8087-88, ¶35 (“we believe as a policy matter that the discrete category approach is not desirable because it is not required to protect either customers’ reasonable expectations of privacy or competitors’ interests”); *id.* at 8101-02, ¶53 (“Congress intended that Section 222(c) would protect customers’ reasonable expectations of privacy”). See also *id.* at n. 98 (“our judgment concerning what customers expect is supported by our historical understanding of customer preferences”). As the Tenth Circuit noted in its opinion, while the Commission’s judgment may support a finding that it “acted rationally” in promulgating a rule, *Central Hudson* requires the Commission to narrowly tailor its customer approval regulations to meet the desired goal. *U. S. West, Inc. v. FCC*, 182 F.3rd at 1239.

¹² The Commission cited the Conference Report’s statements that “in new subsection 222(c) the use of CPNI by telecommunications carriers is limited,” and Section 222 represents an attempt by Congress to “balance both competitive and consumer privacy interests with respect to CPNI.” *CPNI Order* at 8089-90, ¶37 (citing Joint Explanatory Statement). The Tenth Circuit was “not satisfied that the interest in promoting competition was a significant consideration in the enactment of §222.” *U. S. West, Inc. v. FCC*, 182 F.3rd at 1236.

¹³ *Id.* at 1235.

state considered the proper balancing of the benefits and harms of privacy,” such as the infringement of First Amendment freedoms.¹⁵ Moreover, the court found the Commission was “not concerned about the disclosure of CPNI within a firm” but only to outside parties.¹⁶

The Commission’s *CPNI Order* greatly exceeded customers’ reasonable expectations of privacy in the use and disclosure of their CPNI. In fact, customers actually expect their telecommunications providers to use their CPNI to provide them existing services and to market them new ones. As such, an opt-in approach would exceed customers’ reasonable expectations, and the harms of such an approach would vastly outweigh the benefits.

Indeed, the *CPNI Order* is void of any empirical explanation or justification for the government’s interest in protecting privacy,¹⁷ and, as the court noted, it fails to expressly state the privacy harm that Section 222 seeks to protect against.¹⁸ Given carriers’ typical use of non-sensitive CPNI and customers’ reasonable expectations that their carriers will use such information, the privacy harm that the Commission claims Section 222 seeks to protect against remains unclear. Even assuming that the Commission has a substantial interest in preventing the disclosure of CPNI, the Commission has failed to demonstrate that, in the current competitive telecommunications market, customers reasonably expect their carrier to use their CPNI to market only those services to which they currently subscribe from that carrier.

As an initial matter, CenturyTel notes that, in using, accessing and disseminating CPNI, carriers do not use or disseminate sensitive or personal information that would inflict

¹⁴ *Id.* at 1239.

¹⁵ *Id.* at 1235.

¹⁶ *Id.* at 1237.

¹⁷ *Id.* at 1235.

¹⁸ *Id.*

specific or significant harm on their customers. Rather, CPNI is used in an effort to provide customers with options about new telecommunications service offerings.¹⁹ Typically, when CenturyTel has the right to access and use CPNI, it discusses with the customer his or her calling patterns, such as the time of day the customer most frequently makes calls, or the types of service offerings to which the customer currently subscribes in an attempt to best determine his or her needs. Most customers do not regard this type of information as particularly sensitive or intrusive when accessed or used by the carrier that provides them these services. Rather, most customers appear to presume that their telecommunications carrier has access to such information by mere virtue of being their service provider²⁰ and expect the carrier to readily use such information – particularly where such CPNI use could improve the customer’s telecommunications service. Indeed, some customers making inquiries on in-bound calls to CenturyTel became vexed when, as previously required by the Commission’s CPNI regulations, the customer service representative requested the customer’s permission to view their customer records to assist them in making decisions about their telecommunications needs. Customers apparently assume and prefer that the CenturyTel representative will use all relevant information to assist them in identifying the most appropriate telecommunications package for their needs.

Moreover, since 1996, telecommunications customers have become more sophisticated regarding their telecommunications needs and the telecommunications options that are available to them. The Commission based its CPNI rules on the pre-1996 Act telecommunications environment in which “customers, as a general matter, could not choose among carriers offering ‘one-stop shopping’ because such comprehensive service packages did

¹⁹ CPNI Order 13 FCC Rcd at 8064, ¶2; 8079-80, ¶22; 8102-04, ¶¶55-56.

²⁰ Even the Commission itself acknowledges that customers are aware that their carriers have access to their CPNI. *Id.* at 8080, ¶23.

not exist.”²¹ Based on the pre-1996 Act environment, the Commission concluded that customers would not expect their carrier to use their CPNI to market them telecommunications services to which they did not subscribe or previously may not have been available from that carrier.²² The telecommunications market has changed markedly since 1996. Carriers now are able to offer services previously unavailable from that carrier and to compete in markets that previously had been prohibited by law. Furthermore, the 1996 Act spawned the introduction of new entrants into the telecommunications industry. As a result, customer expectations about the sale and marketing of telecommunications services have changed significantly since 1996. An opt-out approach would promote a competitive and customer-focused marketplace by giving telecommunications carriers reasonable flexibility to assist customers and to market their products.

In light of the current competitive telecommunications environment, CenturyTel maintains that customers reasonably expect that their carriers will use their CPNI to market *all of the carrier’s telecommunications services*, even if that customer only subscribes to one category of service from that carrier. In the *CPNI Order*, the Commission concluded that customers implicitly approve of their carrier’s use of CPNI within the existing customer-carrier relationship,²³ but that customers do not expect that carriers will use their CPNI to market offerings outside the service to which they subscribe.²⁴ Yet, the Commission provided no reasonable basis for its conclusion to limit carriers’ use of CPNI to the category of service to which the customer subscribes. The Commission simply stated that, because CPNI can be

²¹ *Id.* at 8110, ¶63.

²² *Id.*

²³ *Id.* at 8080, ¶23.

²⁴ *Id.* at 8107-8111, ¶¶60-64.

regarded as highly personal, some customers may not want their carriers to use such information to market all of the services the carrier offers.²⁵ To the extent that the Commission offers any basis - other than its own unsupported viewpoint - for limiting carrier use of CPNI to marketing services that the customer subscribes to from that particular carrier, the *CPNI Order* is based on an outdated competitive model, as noted above. An opt-in approach simply is unsupportable in the current telecommunications market.

Based on these observations, CenturyTel supports an opt-out approach. CenturyTel maintains that this method of customer consent affords informed consent in accordance with the customers' actual expectation, without unreasonably restricting speech and commerce. If the customer fails to respond to the notification of his right to restrict use of CPNI and the carrier uses the information to market the customer new services, such marketing likely will result in no "specific or significant harm" to the customer because, as noted above, most customers assume that their telecommunications carriers use their CPNI to market them services anyway. Moreover, to the extent that customers disapprove of the use of such information, they will have prior notice and may reject the carrier's use of CPNI by notifying the carrier that they would like their CPNI protected.

B. An Opt-In Approach Unduly Restricts Carriers' First Amendment Freedoms and Is Not Justified

The standard for constitutional protection of commercial speech was set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,²⁶ which the Tenth Circuit applied in the vacatur of the Commission's CPNI regulations. To invoke First Amendment

²⁵ *Id.* at 8109, ¶62 (stating "some customers may not desire or expect carriers to use such information for all categories of telecommunications service available, but rather would wish to limit the dissemination of the information outside the service or services to which they subscribed").

²⁶ 447 U.S. 557 (1980).

protection, the speech must concern lawful activity and not be misleading. The regulation must serve a substantial government interest, and it must directly advance the state's asserted interest. Finally, the regulation must not be more extensive than necessary to serve that interest. In addition to questioning how the disclosure of CPNI would harm privacy,²⁷ the Tenth Circuit was dismayed that the Commission had failed "to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy."²⁸

As demonstrated above, because customers have an expectation that their carriers will use their CPNI to provide them quality service, an opt-out approach sufficiently protects consumer privacy and provides customers with proper notification and a reasonable choice of options. Opt-in, on the other hand, unduly limits a carrier's right to communicate with its customer base. As the Tenth Circuit stated, "there must be a fit between the legislature's means and its desired objective."²⁹ While the fit need not be perfect, it must be reasonable. Opt-out achieves the Commission's desired goal of protecting customer privacy without unduly imposing on the carrier's speech.

CenturyTel does not believe, as the Commission initially asserted in the *CPNI Order*,³⁰ that the lack of response to opt-in notices reflects a desire of most customers to prohibit their telecommunications carriers from using their CPNI for marketing purposes. As the Tenth Circuit noted, it is equally plausible that customers are disinterested in the privacy of their CPNI, or they may be generally averse to marketing without specific concerns about the use of CPNI

²⁷ *U.S. West, Inc. v. FCC*, 182 F.3d at 1237-38.

²⁸ *Id.* at 1238-39.

²⁹ *Id.* at 1238.

³⁰ *CPNI Order* 13 FCC Rcd at 8139, ¶100.

for this purpose.³¹ It is fair to assume that most customers who fail to respond to such notices are reacting to the fact that they already receive an overwhelming amount of promotional materials in the mail. As a result, the opt-in forms go unanswered by the majority of customers. Customers simply do not want to respond to yet another notice in the mail or another telephone call, particularly because they assume that their telecommunications carriers already use their CPNI to market them new services.

Recently, CenturyTel conducted an e-mail campaign that allowed customers to sign up over the Internet for interexchange services. In an effort to verify that participating customers had desired the service in question, CenturyTel followed up each customer's e-mail with a call to confirm that he or she had in fact requested CenturyTel's services. Ironically, many customers were upset by the follow-up call, stating that they had signed up via the Internet precisely *to avoid* telephone calls from telecommunications services providers. This experience demonstrates telemarketing angst among the general public. Consequently, consumers often view legitimate calls as a nuisance as well.

C. There Are Significant Costs Associated With Opt-in.

The Tenth Circuit noted in its opinion that, rather than merely asserting a broad interest in privacy, the Commission must “specify the particular notion of privacy and interest served” by the restriction on speech.³² In cataloguing some of the real costs on society that privacy protections impose, the court noted that privacy interests can interfere with “the collection, organization, and storage of information which can assist businesses in making rapid, informed decisions and efficiently marketing their products or services,” which can result in

³¹ *U.S. West, Inc. v. FCC*, 182 F.3d at 1239.

³² *Id.* at 1235.

reduced productivity and higher prices for those services.³³ The Commission should keep these business considerations in mind as it considers the proper balancing of the benefits the CPNI rules yield and the harms they impose.

In the *Clarification Order and Second Further Notice*, the Commission seeks comment on the relative costs and convenience of CPNI use under opt-in and opt-out approaches.³⁴ Pursuant to the Commission's recent *Clarification Order*, CenturyTel plans to obtain customer approval by means of an opt-out approach. Specifically, CenturyTel plans to send customers a detachable reply card as an insert with the customer bill. It will cost CenturyTel a significant amount of money to notify its customers of their CPNI rights in this manner. To obtain customer approval by means of an opt-in approach, however, is even more expensive when the extremely low response is considered (CenturyTel marketing experience suggests that a one or two percent return rate is typical for such unsolicited mailings). That the opt-in approach is substantially more burdensome than an opt-out rule cannot be disputed.

CenturyTel notes that the Commission's "total service" approach restricting use of CPNI to market customers service beyond those to which the customer currently subscribes from CenturyTel adds to the costly ramifications of the FCC rules. Because of these restrictions under the opt-in rules, CenturyTel is forced to market its services in a fragmented way, resulting in customer confusion during inbound calls.³⁵ For example, during inbound calls, customers assume that their CPNI appears on the customer service representative's screen while the

³³ *Id.* at n.7.

³⁴ *Clarification Order and Second Further Notice* at ¶20.

³⁵ The Commission's rules should be crafted in a way that minimizes customer confusion about the use of CPNI. For example, where customers subscribe to more than one service from a carrier, the Commission concluded that customers would become "confused and annoyed" if the carrier did not use all the

representative assists the customer with his or her particular telecommunications needs. Asking the customer for express approval prior to using the customer's record to offer alternative services typically engenders surprise or frustration on the customer's part. Requiring express customer approval to use CPNI during inbound calls simply is inconsistent with customer expectations, and, therefore, often ineffective. Thus, CenturyTel supports unrestricted use of CPNI within a company under an "opt-out" rule.

III. CONCLUSION

For the aforementioned reasons, CenturyTel supports opt-out as the means for obtaining customer consent to use CPNI for marketing purposes because (1) customers expect that their telecommunications service provider will use their CPNI to offer them new services, bundled services and alternative services, and (2) opt-out is less costly and more effective than opt-in, and more realistically reflects customer expectations regarding their telecommunications provider in today's competitive environment. Accordingly, CenturyTel respectfully requests that the Commission adopt an opt-out requirement.

information available to him to provide "complete customer service." *CPNI Order* 13 FCC Rcd at 8103, ¶55.

Respectfully submitted,

CENTURYTEL, INC.

John F. Jones
Vice President, Federal Government Relations
CENTURYTEL, INC.
100 Century Park Drive
Monroe, Louisiana 71203
(318) 388-9000

Karen Brinkmann
Tonya Rutherford*
LATHAM & WATKINS
Suite 1000
555 Eleventh Street, N.W.
Washington, D.C. 20004-1304
(202) 637-2200

Counsel for CENTURYTEL, INC.

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